STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc.	)	
	)	
vs.	)	ICC Docket No. 01-0843
	)	
AT&T Communications of Illinois, Inc. and AT&T Corporation.	)	
	)	
In the Matter of a Complaint Pursuant to 220 ILCS 5/13-515	)	

RESPONSE OF XO ILLINOIS, INC. TO AT&T's MOTION TO DISMISS

Now comes XO Illinois, Inc. ("XO"), by its attorneys, and in response to the Motion to Dismiss filed by AT&T Illinois, Inc. and AT&T Corporation, (collectively "AT&T") states as follows:

INTRODUCTION

AT&T's Motion to Dismiss is a continuation of its improper self-help approach to its tariff obligations with other carriers. As has been its practice throughout the country, AT&T has first refused to pay any of XO's lawful access charges and 800 database queries under XO's properly filed tariff and then, in response to XO's complaint, has argued that those rates are not just and reasonable. By raising the justness and reasonableness of XO's rates, AT&T has reaffirmed that XO's complaint gives the Commission jurisdiction over Count I. Similarly, AT&T has provided no reason to dismiss Count II other than it does not believe that the complaint provides sufficient specificity of the harm experienced by XO.

AT&T's attempt to dismiss this proceeding (presumably so it can be filed in circuit court, where it would then be dismissed when AT&T raises its affirmative defense that the rates are not just and reasonable) or in the alternative, to have it placed on a more leisurely Article 10 schedule, is an attempt to delay payment for services that it knowingly and willingly accepted from XO. Delaying those payments injures XO and other CLECs that are subjected to AT&T's act of self-help, and ultimately, could affect the availability of competitive local exchange services in Illinois.

COUNT I

AT&T argues that Count I of XO's complaint should be dismissed because the complaint fails to state a claim upon which relief can be granted. According to AT&T, this proceeding is merely a collection action and the failure to pay rates set forth in a tariff is not a violation of the Illinois Public Utilities Act ("PUA"). AT&T also argues that it is a competitive carrier and none of the provisions of Article 9 that apply to competitive carriers are relevant to this proceeding. AT&T is wrong in all of its arguments.

AT&T's claims must be considered in light of its actions across the country. As noted in paragraph 11 of XO's complaint:

> AT&T and its affiliates, which together constitute one of the three largest providers of long distance service in the United States, have waged a nationwide, self-help campaign against various competitive local exchange carriers by refusing to pay their lawfully-tariffed charges, even while it continues to use their services and facilities. (citation omitted)

XO also noted in paragraph 12 of its complaint that:

> Upon information and belief, AT&T has relied on its large customer base to withhold funds owed to competitive new entrants, like XO, in an attempt to coerce lower rates.

Thus, there is considerable history behind the complaint of XO. As noted above, AT&T has refused to pay any access charges that it believes are too high. On January 5, 2000, Advamtel LLC and several other CLECs filed an action in Federal District Court against AT&T for its failure to pay interstate access charges. AT&T raised the same just and reasonable defense it alleges in its Fifth Affirmative Defense in this proceeding. The court referred the case to the Federal Communications Commission ("FCC") to adjudicate this defense. *Advamtel LLC v. AT&T Corp.*, 105 F. Supp. 2d 507, 510 (E.D. Va. 2000). AT&T then initiated an action before the FCC to determine whether the rates of the plaintiffs in *Advamtel* were just and reasonable. *AT&T Corp. v. Business Telecom, Inc*; *Sprint Communications Company, L.P., v. Business Telecom, Inc.*, FCC 01-135 (May 30, 2001). Later, the court also referred to the FCC the claims of AT&T that it had not ordered access services from the defendants and that it had the right to refuse to connect to CLECs whose rates it thought were too high. *Advamtel LLC, et al. v. Sprint Communications Company, L.P.*, 125 F. Supp.2d 800 (E.D. Va. 2001). These claims were adjudicated by the FCC in another action initiated by AT&T. *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, FCC 01-313 (October 19, 2001).

The case now before this Commission is the intrastate version of the same battle that has been fought on an interstate level. This case is thus the latest in a long string of cases dealing with AT&T's refusal to pay charges due under lawfully filed access charge tariffs.

Does this Commission believe that a circuit court has jurisdiction over the same issues that the Federal District Court does not have jurisdiction to adjudicate? This is not simply a collection case and is not in any way analogous to a collection dispute between a telecommunications carrier and a retail customer. AT&T and XO are telecommunications providers licensed by this Commission to provide local and interexchange service in Illinois. AT&T has a substantial portion of the interexchange and toll market in Illinois. AT&T admits in its Answer that it has refused to pay XO's invoices after March 2001 because, it claims, "XO is not entitled to payment." AT&T Answer, paragraph 10. The refusal of AT&T to pay XO's lawful rates for access service and 800 Data Base queries could have a substantial adverse impact on customers of both entities because neither is obligated to provide those services to the other without compensation.

Moreover, AT&T concedes this Commission's jurisdiction in its Answer and Affirmative Defenses. AT&T's Fifth Affirmative Defense is as follows:

> XO's intrastate access charges are excessive, unjust and unreasonable and are, therefore, unlawful and in violation of Article IX of the Illinois Public Utilities Act.

Clearly, this is an issue that only this Commission can decide. As stated by the court in *Sutherland v. Illinois Bell and AT&T*, 254 Ill. App. 3d 983; 627 N.E.2d 145 (1st Dist, 1993):

> We have held without exception that under that section, the ICC has exclusive original jurisdiction over a complaint which relates to a "rate" charged by a utility as defined by section 3-116 of the Act (Ill. Rev. Stat. 1989, ch. 111 2/3, par. 3-116) (e.g., *Chicago ex rel. Thrasher v. Commonwealth Edison Co.* (1987), 159 Ill. App. 3d 1076, 1079, 513 N.E.2d 460, 462, 112 Ill. Dec. 46; *Consumers Guild of America, Inc. v. Illinois Bell Telephone Co.* (1981), 103 Ill. App. 3d 959, 962, 431 N.E.2d 1047, 1049, 59 Ill. Dec. 290*; Malloy v. Illinois Bell Telephone Co.*

> (1973), 12 Ill. App. 3d 483, 484, 299 N.E.2d 517, 517-18*);* and it is axiomatic that a plaintiff must exhaust that administrative remedy before it may request relief in the circuit court. *Thrasher,* 159 Ill. App. 3d at 1079, 513 N.E.2d at 462; *Klopp v. Commonwealth Edison (1977*), 54 Ill. App. 3d 671, 675, 370 N.E.2d 822, 825, 12 Ill. Dec. 911*; Adler v. Northern Illinois Gas Co. (1965),* 57 Ill. App. 2d 210, 218, 206 N.E.2d 816, 819.

Having previously paid XO's tariffed rates without formal complaint, AT&T has, as of April 2001, arbitrarily decided that XO's tariffed rates are too high. Rather than file a complaint with the Commission making such an allegation, it has chosen to pay XO nothing and force XO to initiate an action to recover the revenues due under XO's tariffs. AT&T has engaged in the same tactic in the interstate arena, where it has paid nothing on interstate access charge tariffs and thus forced carriers to file actions against it to recover funds owed under those tariffs. In response to actions brought by CLECs in the Federal District Court for the payment of access charges, AT&T argued that the tariffs were too high. As noted above, the court in *Advamtel* referred the parties' dispute concerning the reasonableness of the published tariff rates to the FCC. The court stated:

> One issue typically referred to the FCC under the primary jurisdiction doctrine is the reasonableness of a carrier's tariff because that question requires the technical and policy expertise of the agency, n11 and because it is important to have a uniform national standard concerning the reasonableness of a carrier's tariff, as a tariff can affect the entire telecommunications industry. *See MCI Telecommunications Corp. v. Ameri-Tel, Inc., 852 F. Supp. 659, 665 (N.D. Ill. 1994).*
>
> (footnote omitted), *Id*. 105 F. Supp. 2d at 511.

The District Court also noted that while courts are the appropriate forum for a carrier to bring a collection action based on an established tariff, AT&T's counterclaim of the reasonableness of the rates was sufficient to invoke FCC jurisdiction. *Id.* This

Commission could expect the same result from an action brought by XO before a circuit court in Illinois.

In summary, AT&T is not just another deadbeat customer that cannot or will not pay its bills. It is a telecommunications carrier that must be told to stop using self help to challenge other carriers tariffs and instead pay properly tariffed rates for the services that it receives. This intercarrier dispute not only adversely affects competition, but if not resolved by this Commission, could have customer-effecting consequences. XO's properly tariffed rates are presumed just and reasonable. In fact, the Public Utilities Act prohibits XO from charging rates different from those on file with this Commission.[1] The prohibition against retroactive ratemaking and the filed rate doctrine require that AT&T honor XO's rates as tariffed. Further, the issue of the reasonableness of XO's rates is an issue that demands the expertise of this Commission.

Count II

AT&T argues that XO has failed to specify how AT&T's actions are anticompetitive. AT&T is wrong. XO's complaint provided sufficient detail of AT&T's violations of Section 13-514 of the Act to meet the criteria set forth in Section 13-515.

[1] "Except as in this Act otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product, or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, except as provided in Section 9-104, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons." 220 ILCS 5/9-240.

XO referenced two of the *per se* violations of the Act in paragraphs 16 and 17 of its Complaint. First, XO alleged that AT&T's action is a violation of Section 13-514(2), which prohibits carriers from "unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier." Second, XO alleged that AT&T violates Section 13-514(6) because it impedes competition by "unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers." In effect, XO has been forced to provide service to AT&T with no remittance. XO is at a significant disadvantage in the competitive market if it is unable to collect its lawfully tariffed rates.

XO also alleged that AT&T's action discriminates against XO because AT&T has not withheld payment from its own affiliates or from incumbent local exchange carriers. This specific allegation of discriminatory treatment, while not one of the enumerated provisions in the Act, falls within the Commission's authority in Section 13-514 to go beyond the enumerated provisions in determining if an action violates the Act.[2]

XO's complaint provides sufficient grounds to continue this proceeding under Section 13-515. This case is not simply a collection case for unpaid bills. As noted in paragraph 12 of the complaint,

> Upon information and belief, AT&T has relied on its large customer base to withhold funds owed to competitive new entrants, like XO, in an attempt to coerce lower rates. In effect, XO is forced to choose between sending traffic to AT&T knowing it will not be paid or blocking such traffic, which would alienate XO's customers. In either case, AT&T's actions leave XO at risk of violating state or federal laws.

[2] "The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited . . ." 220 ILCS 5/13-514.

As noted in footnote 1 of the Complaint, in *MGC Communications, Inc. v. AT&T Corp.*[3] the FCC found AT&T liable for its failure to pay for interstate access services provided by MGC, observing that:

> it appears that AT&T may have attempted to use the threat of termination of MGC's access service - or the withholding of payment for service that it continued to receive - as a means of exerting pressure on MGC in the parties' ongoing rate reductions.
>
> *Id.* at para. 9

AT&T is now exerting this same pressure on XO, placing XO between the proverbial rock and a hard place. XO cannot afford to provide access service to AT&T for free. As noted in paragraph 10, AT&T has already withheld approximately one half a million dollars from XO. Nor can XO practically exercise its legal right to deny AT&T access services for which it refuses to pay. As noted in paragraph 12 of the Complaint, while XO could refuse to complete calls handed off to it by AT&T and prevent its customers from making toll calls to AT&T customers, such actions would alienate XO's customers. All of those customers expect to be able to reach any telecommunications customer in the world. Nor can XO mitigate its costs by unilaterally switching its customers to another long distance provider that pays its bills without placing itself at significant legal risk. As noted by the court in footnote 2 of the Complaint, the court in *MGC Communications Inc. v. AT&T Corp.*, Memorandum Opinion and Order, DA 99-1395 (Com. Car. Bur. rel. Jul. 16, 1999) held that:

> any effort by MGC unilaterally to migrate its customers to a different IXC not only would have raised confusion among the carriers' shared customers, but also would have placed MGC at significant legal risk
>
> .

---

[3] *MGC Communications, Inc. v. AT&T Corp.* Memorandum Opinion and Order, File No. EAD-99-002, FCC 99-408 (Dec. 28, 1999)

Furthermore, AT&T's motion glosses over the discrimination allegation. AT&T merely claims that its payment of access charges to other carriers (including its own affiliates) at the same time it is denying payments to XO "is of no consequence." Contrary to AT&T's claim, its action results in serious consequences. As noted in paragraph 21 of the Complaint:

> AT&T's actions allow AT&T to curtail the revenue streams of its competitors while continuing to fund its own CLEC operations. AT&T's discrimination against unaffiliated CLECs confers a significant advantage upon AT&T's own LEC affiliates and is in violation of 13-514.

What could be more anticompetitive than that? As this Commission is aware, the CLECs, especially small CLECs, have been faced with a changing and difficult financial market. By unilaterally refusing to pay CLECs' properly tariffed access charges, while continuing to pay ILECs and its own affiliates, AT&T is aggravating what is already a stressed financial environment.

The FCC has already criticized AT&T for its self help actions. In *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues,* FCC 01-313 (October 19, 2001), the FCC stated:

> An IXC's protection against unreasonable rates arises from section 201(b) of the Act, which prevents a CLEC from charging an unjust or unreasonable rate for its services. Accordingly, the proper course for an IXC faced with what it views as excessive access rates is to challenge the rate as violative of section 201(b).
>
> *Id.* para 24.

AT&T certainly knows how to file a complaint with this Commission alleging unjust and unreasonable rates. For example, in *In the Matter of the Complaint of AT&T Communications of Illinois, Inc. v Illinois Bell Telephone Company,* Ill.C.C. Docket No 99-0039, AT&T filed a complaint challenging Illinois Bell Telephone Company's

intrastate access charges. As noted by the FCC, that is the appropriate response to perceived excessive rates. In the case at hand, AT&T has acted anticompetitively and in violation of Section 13-514 of the Act.

CONCLUSION

For the reasons provided above, the Commission should deny the Motion to Dismiss of AT&T.

Dated: January 8, 2002.

Respectfully submitted,

By: _____

Stephen J. Moore
Thomas H. Rowland
Rowland & Moore
77 West Wacker Drive
Suite 4600
Chicago, IL 60601
(312) 803-1000
r&m@telecomreg.com

Carol Pomponio
Manager, Regulatory Affairs
XO Illinois, Inc.
303 East Wacker
Concourse Level
Chicago, Illinois 60657
(312) 327-2103
carol.pomponio@xo.com

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc.	)	
	)	
vs.	)	ICC Docket No. 01-0843
	)	
AT&T Communications of Illinois, Inc.	)	
and AT&T Corporation.	)	
	)	
In the Matter of a Complaint	)	
Pursuant to 220 ILCS 5/13-515	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Response of XO Illinois, Inc. to the Motion to Dismiss of AT&T has been served upon the parties listed on the attached service list on January 8, 2002, by electronic mail.

_____

Stephen J. Moore
ROWLAND & MOORE
77 West Wacker Drive
Suite 4600
Chicago, Illinois 60601

NOTICE OF FILING

PLEASE TAKE NOTICE that I have on this 8th day of January, 2002, filed with the Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, the Response of XO Illinois, Inc. to the Motion to Dismiss of AT&T in the above-captioned proceeding.

_____

Stephen J. Moore

Service List Docket 01-0843

Claudia Sainsot
Administrative Law Judge
Illinois Commerce Commission
160 N. LaSalle Street, Suite C-800
Chicago, IL 60601-3104
E-Mail: csainsot@icc.state.il.us

Nada Carrigan
Vice President
913 S. 6th St., 3rd Fl.
Springfield, IL 62703
E-Mail: carrigan@att.com

John Gomoll
Vice President
AT&T Communications
222 W. Adams, Ste. 1500
Chicago, IL 60606
E-Mail: gomolj@att.com

Cheryl Hamill
Douglas W. Trabaris
Law Department
AT&T
Suite 1500, 222 W. Adams
Chicago, IL 60606
E-Mail: chamill@att.com
E-Mail: dtrabaris@lga.att.com

Carol P. Pomponio
XO Illinois, Inc.
Concourse Level
303 E. Wacker
Chicago, IL 60601
E-Mail: carol.pomponio@xo.com

Nancy Wells
AT&T
620 S. 5th
Springfield, IL 62703
E-Mail: njwells@att.com

Myra Karegianes
General Counsel
Illinois Commerce Commission
160 N. LaSalle Street, Suite C-800
Chicago, IL 60601-3104
E-Mail: mkaregia@icc.state.il.us

Scott Wiseman
Executive Director
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
E-Mail: swiseman@icc.state.il.us